TNB ENGINEERING AND CONSULTANCY SDN BHD & ANOR

v.

BOCCARD OIL & GAS SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ZULKEFLI MAKINUDIN JCA
RAUS SHARIF JCA
[CIVIL APPEAL NO: W-02-129-2006]
20 NOVEMBER 2007

CONTRACT: *Building contract - Sub-subcontract - Arbitration clause - Dispute referred to arbitration - Whether arbitration proceedings would result in duplicity of proceedings in view of action filed by subcontractor against main contractor in court - Whether sub-subcontractor should be party to court proceedings - Whether arbitration clause invalid*

CONTRACT: *Arbitration - Arbitration clause - Sub-subcontract - Dispute referred to arbitration - Whether arbitration proceedings would result in duplicity of proceedings in view of action filed by subcontractor against main contractor in court - Whether sub-subcontractor should be party to court proceedings - Whether arbitration clause invalid*

The plaintiffs and the defendant were the subcontractor and sub-subcontractor respectively of a power station project in which TBV Power (Malaysia) Sdn Bhd ('TBV') was the main contractor. A dispute arose between the plaintiffs and the defendant which the defendant referred to arbitration as per its sub-subcontract with the plaintiffs. In the interim period, the plaintiffs and TBV entered into a settlement agreement in respect of sums due under the sub-contract between them. A dispute arose in respect thereof which led the plaintiffs to file an action against TBV ('the D3 Action'). The defendant was not a party to the settlement agreement. The plaintiffs then filed an action against the defendant that its dispute with the defendant should be dealt with by the court and that the appointment of arbitrators pursuant to cl. 40 of the sub-subcontract was invalid. The High Court dismissed the action. As a result thereof, the plaintiffs filed an application for an Erinford injunction to restrain the defendant from proceeding with the arbitration proceedings pending the plaintiffs' appeal to the

Court of Appeal. That application was dismissed as well. Following this, the plaintiffs filed a notice of motion before the Court of Appeal seeking for the second time an Erinford injunction to restrain the defendant from proceeding with the arbitration proceedings. When the notice of motion came up for hearing, the court, however, decided to proceed to hear straight away the plaintiffs' appeal against the decision of the High Court dismissing the plaintiffs' action against the defendant.

Held (allowing the plaintiffs' appeal)

Per Zulkefli Makinudin JCA delivering the judgment of the court:

(1) The sub-contract and the sub-subcontract were identical in all material particulars. The works undertaken by the defendant as the sub-subcontractor of the plaintiffs were the same works to be carried out by the plaintiffs for TBV under the subcontract. It was agreed that TBV ought to indemnify the plaintiffs against all claims by the defendant under the sub-subcontract in the event the plaintiffs were held liable to the defendant under the sub-subcontract. It was also noted that two claims in relation to the dispute surrounding the parties were filed at around the same time. In the first claim, the plaintiffs claimed against TBV and its directors in the D3 Action. In the second claim, the defendant's arbitration claim against the plaintiffs was based on works carried out by the defendant under the sub-subcontract on behalf of the plaintiffs in order to fulfil the plaintiffs' obligation under the sub-contract entered into with TBV. (paras 6 & 7)

(2) Based on the common cls. 40, 41 and 47 of the sub-contract and the sub-subcontract, there were common law issues of law and fact involving the three parties, namely, the plaintiffs, the defendant and TBV that needed to be resolved. The plaintiffs ought to bring in the defendant into the D3 Action so as to indemnify itself. In the D3 Action, it was the contention of TBV that the plaintiffs failed to take the necessary steps to comply with the terms of the subcontract. Also, that the plaintiffs failed to supervise the progress of the work carried out by the defendant to ensure completion within the stipulated time. By reason of the plaintiffs' failure thereof, TBV alleged that it suffered loss and damage. This court was

of the view that the party who would be in the best position to explain those allegations by TBV and being the party that did the works for the plaintiffs and possessed all the relevant records and documents of the same would be the defendant. (para 9)

(3) It was TBV's contention in the D3 Action, that if the plaintiffs failed to obtain the assistance of TBV to defend the claim instituted by the defendant, TBV would not be obliged to make payments to the plaintiffs for any award or judgment which the defendant might obtain against the plaintiffs. Therefore, it followed that unless the plaintiffs could bring the defendant as a party to the D3 Action, or manage to consolidate its action with the action against TBV, the plaintiffs would be prejudiced. (para 10)

(4) The defendant was aware of its agreement to indemnify the plaintiffs for works done as acknowledged by the defendant in the sub-subcontract. Further, pursuant to cl. 47 thereof, the defendant was to indemnify the plaintiffs and TBV from and against all claims, damages, losses and expenses, direct, indirect or consequential arising out of or resulting from the performance of the work done by the defendant as sub-subcontractor, any person or organisation directly or indirectly employed by any of them. (para 11)

(5) The hearing of the defendant's claim against the plaintiffs in the arbitration proceedings would result in duplicity of proceedings. The dispute between the plaintiffs and the defendant was whether the plaintiffs owed the defendant any sum of money and if so, the amount. That dispute was in fact an integral part of the dispute between the plaintiffs and TBV. (para 13)

(6) The sub-subcontract could not be read in isolation as being between the plaintiffs and the defendant to the exclusion of any other party, in particular TBV. The sub-subcontract must necessarily be subject to the sub-contract between the plaintiffs and TBV. For that reason, the plaintiffs were justified in invoking O. 4 r. 1(1) of the Rules of the High Court 1980 in aid of their cause. (para 14)

(7) The common cls. 40 and 41 of the subcontract and the sub-subcontract when read as a whole showed that under cl. 41 of the subcontract, the court had the exclusive jurisdiction to hear and determine all actions and proceedings which arose out of the sub-subcontracts. Clause 40 relating to arbitration in the relevant sub-subcontract contradicted and was inconsistent with cl. 41 of the sub-subcontract so much so that the court ought not to give effect to the same. Such disputes as exist between the parties should be decided by the court. (para 16)

Legislation referred to:
Arbitration Act 1952, s. 6
Rules of the High Court 1980, O. 4 r. 1(1)

For the appellants/plaintiffs - SK Ganesan; M/s Philip Choong & Co
For the respondent/defendant - James Monteiro (Shirleena Jogeswaran with him); M/s Zaid Ibrahim & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: D3-24-50-2005]

Reported by Usha Thiagarajah

JUDGMENT

Zulkefli Makinudin JCA:

Introduction

[1] The plaintiffs filed an originating summons dated 16 February 2005 seeking *inter alia*, a declaration that (i) any dispute between the plaintiffs and the defendant in respect of the sub-subcontracts should be dealt with by the Courts of Malaysia and (ii) the appointment of the arbitrators by the defendant pursuant to cl. 40 of the sub-subcontracts is invalid. The plaintiffs' originating summons was heard and dismissed by the learned judge of the High Court on 16 January 2006. The plaintiffs filed the notice of appeal dated 8 February 2006 against the said decision.

[2] After the final disposal of the originating summons, the plaintiffs filed an application for Erinford Injunction before the High Court seeking a further order that the defendant be restrained from proceeding with the arbitration proceedings initiated by the defendant pending the plaintiffs' appeal to the Court of Appeal.

This application for an Erinford Injunction was dismissed by the High Court on 13 July 2006. Thereafter, the plaintiffs filed a notice of motion dated 3 August 2006 before the Court of Appeal seeking for the second time an Erinford Injunction to restrain the defendant from proceeding with the arbitration proceedings to determine a dispute between the plaintiffs and the defendant pending the plaintiffs' appeal. When this notice of motion came before us for hearing, we directed the parties that we would proceed to hear straight away the plaintiffs' appeal against the decision of the High Court in dismissing the plaintiffs' originating summons dated 16 February 2005 since the relevant records of appeal had already been filed before the court.

Background Facts

[3] The relevant background facts of the case are as follows:

(1) TBV Power (Malaysia) Sdn. Bhd. ("TBV") is a company incorporated in Malaysia and was the contractor for the supply and installation of works for the third phase of Sultan Salehuddin Abdul Aziz Power Station-Phase 3 (Units 5 and 6) located in the vicinity of Kapar for Tenaga Nasional Berhad ("the project") and comprising 2 x 500 MW turbine generator units complete with all auxiliary equipment and materials ("the main contract works").

(2) In line with the appointment of TBV as the contractor for the project, the plaintiffs and TBV entered into two sub-contracts both dated 20 September 1996 whereby the plaintiffs agreed to design, fabricate and deliver Low Pressure Fabricated Pipe (the Sub-Contract for Low Pressure Fabricated Pipe) and Low Pressure Pipe Supports (the Sub-Contract for Low Pressure Pipe Supports) for the project in accordance with the conditions and specifications set out in Section IV of the sub-contracts for the sum of RM5,890,855.09 and RM1,458,144.92 respectively, ("the Sub-Contracts").

(3) Thereafter, the plaintiffs and the defendant entered into two sub-subcontracts issued on 22 January 1997 and 29 January 1997, whereby the defendant agreed to design, fabricate and deliver Low Pressure Fabricated Pipe (the Sub-Subcontract for Low Pressure Fabricated Pipe) and Low Pressure Pipe Supports (the sub-subcontract for Low Pressure Pipe

Supports) for the project in accordance with the conditions and specifications set out in Section IV of the sub-subcontracts for the sum of RM5,610,300 and RM1,388,700 respectively ("the sub-subcontracts").

(4) A dispute arose between the plaintiffs and the defendant in respect of the sub-subcontracts and the defendant referred the dispute to arbitration pursuant to the terms of the sub-subcontracts.

(5) The plaintiffs and TBV entered into a settlement agreement ("the settlement agreement") in respect of the sums due under the sub-contracts entered into between the plaintiffs and TBV. There subsequently arose a dispute in regard to the settlement agreement in respect of which the plaintiffs initiated Civil Suit No. D3-22-66-2005 ("the D3 action") against TBV. The defendant is not a party to the settlement agreement.

Contention Of The Plaintiffs

[4] It is the contention of the plaintiffs that the dispute between the plaintiffs and the defendant should not be referred to arbitration as there is a conflict between the provisions of cl. 40 and cl. 41 of the sub-subcontracts which result in the Courts of Malaysia having exclusive jurisdiction to hear and determine all actions arising from the sub-subcontracts. The plaintiffs further contended that the agreement entered into between the plaintiffs and TBV, a third party precludes the defendant from exercising its contractual rights to refer the dispute between the plaintiffs and the defendant to arbitration. The plaintiffs also contended that the dispute between the plaintiffs and the defendant should be consolidated with the separate and distinct dispute between the plaintiffs and TBV, the third party.

Contention Of The Defendant

[5] It is the defendant's contention on the other hand that the dispute between the plaintiffs and the defendant should be referred to arbitration. The unequivocal terms of the sub-subcontracts that are valid and binding on the parties expressly provide that any dispute arising thereunder is to be referred to arbitration. It is clear, upon a proper construction and interpretation, that cl. 40 and cl. 41 of the sub-subcontracts are not inconsistent or contradictory with each other. The defendant also challenged the

basis of the plaintiffs' contention that the dispute between the plaintiffs and the defendant should be consolidated with the separate and distinct dispute between the plaintiffs and the third party. To the defendant, any agreement between the plaintiffs and the third party does not bind the defendant or affect the contractual terms of the sub-subcontracts which allow any dispute between the plaintiffs and the defendant to be referred to arbitration. In the circumstances of the case the defendant therefore contended that the reference of the dispute between the plaintiffs and the defendant to arbitration and the appointment of the arbitrators are valid.

Decision Of The Court On Appeal

[6] We have to state at the outset we noted that all the contract documents in the sub-contracts (between the plaintiffs and TBV) and in the sub-subcontracts (between the plaintiffs and the defendant) are identical in all material particulars. The works undertaken by the defendant as the sub-subcontractors of the plaintiffs are the same works carried out by the plaintiffs for TBV under the sub-contracts. In the event the plaintiffs are held liable to the defendant under the sub-subcontracts, TBV ought to indemnify the plaintiffs against all claims by the defendant under the said sub-subcontracts.

[7] It is to be noted that at around the same time two claims in relation to the dispute surrounding the parties had been filed. In the first claim, the plaintiffs have instituted a claim against TBV and its directors in the D3 action. In the second claim, the defendant's arbitration claim against the plaintiffs (under the sub-aubcontracts) is based on works carried out by the defendant under the sub-subcontract on behalf of the plaintiffs in order to fulfill the plaintiffs' obligation under the sub-contracts entered into with TBV.

[8] It is necessary that we reproduce here the relevant common cls. 40, 41 and 47 under the provisions of the sub-contracts and the sub-subcontracts entered into by the respective parties as follows:

GC.40 – Arbitration

40(i) If at any time any question, or difference shall arise between the Sub-Contractor and the Sub-Subcontractor, either party shall, as soon as reasonably practicable, give to the other notice in writing of the existence of such question dispute, or difference,

specifying its nature and the point at issue, and the same shall be referred to the arbitration of a person to be agreed upon or failing such agreement within 6 weeks, to some person appointed on the application of either of the parties to the Contract by the President for the time being of the Institution of Engineers (Malaysia). Any such reference shall be deemed to be as submission to Arbitration under the provision of the Arbitration Act Malaysia 1952 (revised 1972) and/or any statutory modification or re-enactment thereof for the time being in force. The award of the Arbitration shall be final and binding on the parties. Upon every or any such reference the costs of and incidental to the reference and award respectively shall be in the discretion of the Arbitration, who may determine the amount thereof or the basis upon which the same shall be ascertained.

40(ii) Performance of the Contract shall continue during arbitration proceeding unless the Subcontractor shall order the suspension thereof or of any part thereof and if any such suspension shall be ordered the reasonable expenses of the Sub-Subcontractor occasioned by such suspension shall be added to the Contract Price.

GC.41 – Arbitration

41(i) The Contract shall be governed and construed according to Malaysian Law and the Courts of Malaysia shall have exclusive jurisdiction to hear and determine all actions and proceedings arising out of the Contract and the Sub-Subcontractor hereby submits to the jurisdiction of the Courts in Malaysia, for the purpose of all such actions and proceedings.

41(ii) The Sub-Subcontractor binds himself to acknowledge and accepts as final in all respects within the country of domicile of the Sub-Subcontractor or elsewhere any decision or award of an arbitrator or judgment in any court in Malaysia in relation to any dispute between the parties under the Contract whether in respect of payments to be made hereunder or in other matters. This undertaking is valid in all respects in case any such decision, award or judgment is to be enforced in the courts of the country of domicile of the Sub-Subcontractor or elsewhere in any manner.

GC.47 – Indemnification

To the fullest extent permitted by laws and regulations, the Sub-Subcontractor shall defend, indemnify, and hold harmless Purchaser, Engineer, Contractor and Subcontractor and their officers, directors, partners, consultants, agents and employees from and against all claims, damages, losses, and expenses, direct, indirect, or consequential (including but no limited to fees and

charges of engineers, architects, attorneys, and other professionals and court and arbitration costs) arising out of or resulting from the performance of the work by the Sub-Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the work or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder or arises by or is imposed by laws and regulations regardless of the negligence of any such party.

In any and all claims against Purchaser, Engineer, Contractor or Subcontractor or any of their officers, directors, partners, consultants, agents, or employees by any employee of the Sub-Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the work or anyone for whose acts any of them may be liable, this indemnification obligation shall not be limited in any limitation on the amount or type of damages, compensation, or benefits payable by or for the Sub-Subcontractor or any other person or organization under workers' or workmen's compensation acts, disability benefit acts, or other employee benefit acts, nor shall this indemnification obligation be limited in any way by any limitation on the amount or type of insurance coverage provided by the Purchaser, the Contractor, the Subcontractor, or the Sub-Subcontractor.

[9] In view of the above, we therefore find there are common issues of law and fact involving the three parties, namely the plaintiffs, the defendant and TBV that need to be resolved. It is our considered view that the plaintiffs ought to bring in the defendant into the D3 action to indemnify themselves. In the D3 action instituted by the plaintiffs against TBV, it is the contention of TBV as pleaded under para. 7 of its defence that the plaintiffs had failed to take the necessary steps to comply with the terms of the contract (the sub-contracts) and that the plaintiffs failed to supervise the progress of works carried out by the sub-subcontractors to ensure that the works were completed by the sub-subcontractors within the agreed stipulated period. By reason of the plaintiffs' failure, TBV has alleged that it had suffered loss and damage. On this point, we are of the view the party who would be in the best position to explain these allegations by TBV and being the party who did the works for the plaintiffs and possessed all the relevant records and documents of the same, would be the defendant.

[10] It is noted also under para. 11 of the defence of TBV in the D3 action, TBV contended *inter alia* that if the plaintiffs failed to obtain the assistance of TBV to defend the claim instituted by the defendant, TBV would not be obliged to make payments to the plaintiffs for any award or judgment which the defendant herein may obtain against the plaintiffs. On this point we are of the view unless the plaintiffs can bring the defendant as a party to the D3 action, or manages to consolidate its action with the action against TBV, the plaintiffs would be prejudiced.

[11] As regards the defendant's agreement to indemnify the plaintiffs for "works" done, we are of the view that the defendant is aware of this link, and has acknowledged it in the sub-subcontracts, as can be seen at Form A of the Form of Agreements at pp. 361 and 437 of the sub-subcontracts. Form A reads as follows:

> In consideration of the payment to be made by the Subcontractor to the Sub-Subcontractor as hereinafter mentioned the Sub-Subcontractor hereby convenants "with the Subcontractor that the Sub-Subcontractor shall and will duly provide, deliver including technical supervision as required, the works and shall do and perform all other acts and things in the Contract mentioned or described or to be implied therefrom or may reasonably be necessary for the completion of the said works within and at the times and in the manner and subject to the terms and conditions mentioned herein and *so as to enable the Subcontractor to comply with and satisfy the provisions and requirements of the Main Contract and the Sub-Subcontractor hereby indemnifies the Subcontractor from and against all or any claims, damages, losses, and expenses (both direct and indirect) incurred by the Subcontractors as a result of any such breach by the Sub-Subcontractor.* (emphasis added)

[12] It is further noted pursuant to cl. 47, the defendant is to indemnify *inter alia* the plaintiffs (sub-contractor) and TBV (contractor) from and against all claims, damages, losses and expenses, direct, indirect, or consequential arising out of or resulting from the performance of the work by the sub-subcontractor (ie, the defendant), any person or organization directly or indirectly employed by any of them.

[13] We find there is no provision under the Arbitration Act 1952 for the plaintiffs to join TBV and/or the directors of TBV (the defendants in the D3 action) for an indemnity against the defendants' claim against the plaintiffs under the sub-subcontracts. The hearing of the defendants' claim under the sub-subcontracts

against the plaintiffs in the arbitration proceedings would deprive the plaintiffs of their right to institute third party proceedings against TBV and/or the directors of TBV to indemnify them (the plaintiffs) against the defendants' claim against the plaintiffs under the sub-subcontracts. We are of the considered view that the hearing of the defendant's claim under the sub-subcontracts against the plaintiffs in the arbitration proceedings would result in duplicity of proceedings. The dispute between the plaintiffs and the defendant is whether the plaintiffs owe the defendant any sums of money and if so, the amount. This dispute is in fact an integral part of the dispute between the plaintiffs and TBV.

[14] It is our judgment that the sub-subcontracts cannot be read in isolation as being between the plaintiffs and the defendant to the exclusion of any other party, in particular, TBV. The sub-subcontracts must necessarily be subject to the sub-contracts between the plaintiffs and TBV. It is for this reason that we find the plaintiffs are justified in invoking the provision of O. 4 r. 1(1) of the Rules of the High Court 1980, in aid of its cause and which states as follows:

> (1) Where two or more causes or matters are pending, then, if it appears to the Court:
>
> (a) that some common question of law or fact arises in both or all of them; or
>
> (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
>
> (c) that for some other reason it is desirable to make an order under this rule,
>
> the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

[15] We would also like to state here that on 25 March 2005, TBV (the defendant in the D3 action) filed an application for stay of proceedings in the D3 action under s. 6 of the Arbitration Act 1952 ("application for stay"). In the application for stay, TBV relied on s. 40 of the sub-contracts entered into between the

plaintiffs and TBV (the defendant in the D3 action) which provided for reference of disputes and differences between the plaintiffs and TBV to arbitration. Clauses 40 and 41 in the sub-contracts between the plaintiffs and TBV (the defendant in the D3 action) are identical to cls. 40 and 41 in the sub-subcontracts between the plaintiffs and the defendant in the originating summons herein. In the D3 action, the learned judge of the High Court had on 17 August 2005 dismissed the application by TBV for stay of proceedings. In the circumstances the dispute between the plaintiffs and TBV under the sub-contracts and/or the disputes between the plaintiffs and TBV and the directors of TBV under the settlement agreement would be resolved in a trial before the High Court in the D3 action.

[16] It is our judgment the common cls. 40 and 41 of the sub-contracts and the sub-subcontracts when read as a whole and in their proper construction would show that under the said cl. 41 of each of the sub-subcontracts it is the court which has the exclusive jurisdiction to hear and determine all actions and proceedings which arise out of the sub-subcontracts. The provision of cl. 40 relating to arbitration in the relevant sub-subcontract contradicts and is inconsistent with the said cl. 41 of each of the sub-subcontract, so much so that the court ought not give effect to the same. Such disputes as exist between the parties should be decided by the court.

Conclusion

[17] For the reasons already stated we would allow the appeal by the plaintiffs and set aside the orders of the High Court dated 16 January 2006. We would instead make an order in terms of the declaration as prayed for in the plaintiffs' originating summons dated 16 February 2005. There will be no order as to costs here and in the court below. Deposit paid is to be refunded to the plaintiffs.